CASE COMMENTS

American Postal Workers Union v. United States Postal Service: The Inapplicability of Section 301 "In Aid of Arbitration" Injunctions to Violations of Public Rights

I. INTRODUCTION

In *American Postal Workers Union v. United States Postal Service*,[1] the District Court for the District of Connecticut was presented with the unprecedented issue of whether to grant an injunction to protect employees' first amendment right of free speech,[2] pending arbitration of a labor dispute.[3] In determining that injunctive relief was proper, the district court applied the stringent standard that had developed under section 301 of the Labor Management Relations Act[4] (section 301). Under this standard, injunctive relief is granted when (1) the traditional equitable requirements for issuance of injunctive relief are satisfied,[5] and (2) the injunction is "in aid of arbitration."[6]

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1. 595 F. Supp. 403 (D. Conn. 1984), *aff'd on reconsideration*, 595 F. Supp. 409 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1262 (1986). The district court granted the defendant's motion for reconsideration. On reconsideration, the court denied the defendant's motion for a stay. The Second Circuit reversed the lower court decision by denying injunctive relief. The Supreme Court denied *certiorari*.

2. *See U.S. Const.* amend. I. The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

4. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(a) (1976). Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to citizenship of the parties.

5. The traditional equity test for determining the propriety of issuing injunctive relief is a finding of:

a) irreparable harm and
b) either 1) likelihood of success on the merits or
   2) sufficiently serious question going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the plaintiffs.

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

6. The phrase "in aid of arbitration" refers to a situation whereby a court will issue an injunction to preserve the arbitration process and ensure an effective remedy to an arbitrator. The phrase is not uniformly used by courts to describe this section 301 standard. However, it will be used in this Article to describe the section 301 prerequisite because

In *American Postal Workers*, Philip Danko, the president of the New London Connecticut Area Local of the American Postal Workers Union, AFL-CIO, was informed of his imminent discharge on the grounds of disloyalty to his employer, the United States Postal Service[7] (hereinafter Postal Service).[8] The alleged disloyal conduct was the mailing of a letter to a postal customer stating that mail service was being delayed due to the Postal Service's elimination of fourteen positions at the New London Post Office.[9] Danko and the union commenced grievance and arbitration proceedings pursuant to the provisions of their collective bargaining agreement.[10] Prior to completing these proceedings, however, Danko and the union filed a motion in district court seeking a preliminary injunction to restrain the Postal Service from terminating Danko's employment pending arbitration of the dispute.[11] The plaintiffs argued that an injunction was necessary to avoid the irreparable harm[12] that would

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it was used by both the district court and the court of appeals in *American Postal Workers*. "Frustration of arbitration" will also be used to describe the circumstances in which a section 301 injunction will be granted. In other words, if the court finds that without an injunction there would be a frustration of arbitration, then a section 301 injunction will be issued. Some courts have been creative and described the circumstances when a section 301 injunction will be granted as (1) a showing that arbitration would be but "a futile endeavor," Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc., 529 F.2d 1073, 1077-78 (9th Cir. 1976); or (2) a showing that arbitration would be a "hollow formality," Lever Brothers Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115, 123 (4th Cir. 1976).

7. The United States Postal Service is a governmental corporation established as an "independent unit of the executive branch of the United States." Postal Reorganization Act, 39 U.S.C. §§ 101, 201 (1970).

8. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1986).

9. The letter stated in pertinent part:

> The purpose of this letter is to make you aware of the fact that large amounts of your film mailers are not being processed for outgoing dispatch or incoming delivery. This situation has been going on for some time now. Postal management will not make you aware of this, in fact, they would most likely deny it if questioned about it.

American Postal Workers Union v. United States Postal Service, 716 F.2d 715, 718 (2d Cir. 1985).

10. Two of the four steps of the grievance and arbitration process had been completed by the date of filing the complaint for declaratory and injunctive relief. The complaint was filed three days before the effective date of discharge. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

11. *Id.* at 405-06. Defendant raised the issue that the plaintiffs had failed to exhaust their contractual remedies. The court rejected the defendant's argument stating "defendant's position is that while a court may enforce an arbitration award, a court has no power to maintain the status quo pending the results of arbitration. However, neither the case law nor the Congressionally-established policy favoring arbitration as the means of resolving labor disputes requires this result." *Id. at* 409 (*on reconsideration*), *rev'd* on other grounds. 766 F.2d 715 (2d Cir. 1985).

12. Irreparable injury has been defined as "injury for which a monetary award cannot

result from Danko's discharge. The alleged harm was the possible chilling effect on the exercise of the employees' first amendment right to free speech resulting from a fear of employer retaliation.[13]

The action was brought under section 1208(b) of the 1970 Postal Reorganization Act.[14] However, the parties agreed to apply, by analogy, section 301 of the Labor Management Relations Act.[15] The district court granted the motion for a preliminary injunction, finding the equitable requirements for injunctive relief[16] and the section 301 "in aid of arbitration" prerequisite were satisfied.[17] The Court of Appeals for the Second Circuit reversed the district court when it failed to find either irreparable harm or "frustration of arbitration."[18]

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be adequate compensation." Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

13. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

14. Postal Reorganization Act of 1970, 39 U.S.C. § 1208(b) (1970). The statute provides that "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy." It is unclear under what statutory basis the plaintiffs ultimately obtained jurisdiction. On reconsideration, the district court judge stated:

> As an initial matter, 39 U.S.C. 1208(b) *appears* to vest jurisdiction in this court. Defendant argues, however, that the body of case law applicable to section 1208(b) precludes the exercise of jurisdiction. The parties agree that the law developed under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, applies by analogy (emphasis added).

This cursory and unsatisfactory discussion leaves the reader confused as to the statutory basis upon which the plaintiffs finally obtained jurisdiction, and why the parties felt compelled to stipulate to the use of section 301 analysis. *See infra* note 15.

15. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 409 (D. Conn. 1984) (*on reconsideration*), *rev'd*, 766 F.2d 715 (2d Cir. 1985). This case may prove to be of little precedential value because (1) the anti-injunction provisions of the Norris-LaGuardia Act do not apply to federal employees, United States v. United Mine Workers, 330 U.S. 258 (1947); and (2) the Postal Reorganization Act contains no anti-injunction provisions. Furthermore, courts have routinely granted injunctive relief in disputes brought under the Postal Reorganization Act by applying traditional equitable standards. *See, e.g.*, Owen v. Mulligan, 640 F.2d 1130 (9th Cir. 1981); United Parcel Service v. United States Postal Service, 615 F.2d 102 (3d Cir. 1980). Thus, the appropriateness of applying, by analogy, section 301 of the Labor Management Relations Act is highly questionable. However, it should be noted that the cases cited above did not involve a collective bargaining agreement mandating arbitration of all disputes. Regardless of whether this analysis was properly applied to the facts of *American Postal Workers*, the case is highly relevant to situations in which the section 301 analysis legitimately applies.

16. *See supra* note 5 for equitable requirements for injunctive relief.

17. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

18. American Postal Workers Union v. United States Postal Service, 766 F.2d 715, 723 (2d Cir. 1985). *See supra* note 6 for a definition of "frustration of arbitration."

The plaintiffs in *American Postal Workers* improperly pled their motion for injunctive relief under section 301. They sought injunctive relief to protect their constitutional right to free speech under a labor law provision that only protects private rights secured under collective bargaining agreements.[19] The district court and the court of appeals, in turn, erred in applying section 301 without recognizing or correcting the plaintiffs' mistake. In an attempt to show the inappropriateness of applying the section 301 analysis to *American Postal Workers*, this Article will (1) review the development of section 301 injunctions and the policies underlying the "in aid of arbitration" requirement,[20] (2) examine the application of the section 301 standard to the facts of *American Postal Workers*,[21] (3) scrutinize the court's application of the section 301 standard,[22] and (4) explore the plaintiffs' alternative right to injunctive relief under the Constitution.[23]

II. Emergence of Section 301 Injunctions in Light of the Anti-Injunction Provisions of the Norris-LaGuardia Act

A. Boys Markets *and* Buffalo Forge*—Recognition of Section 301 Injunctions Against Unions Striking Over Arbitrable Issues*

Prior to 1932, federal judges liberally issued injunctions to enjoin striking unions whenever they disapproved of the methods or goals of the strikers.[24] In 1932, Congress enacted the Norris-LaGuardia Act[25] to curtail this practice and "bring some order out of the industrial chaos that had developed."[26] The Norris-LaGuardia Act broadly prohibits the federal courts from issuing injunctions in labor disputes.[27] Thirty-eight years later in the landmark decision *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[28] the Supreme Court recognized an exception to the

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19. *See infra* text accompanying notes 158-60.

20. *See infra* text accompanying notes 24-80.

21. *See infra* text accompanying notes 81-97.

22. *See infra* text accompanying notes 98-121.

23. *See infra* text accompanying notes 122-61.

24. B. Feldacker, Labor Guide to Labor Law 3-4 (1983).

25. 47 Stat. 70, 29 U.S.C. §§ 101-15 (1982).

26. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 251 (1970).

27. Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-15 (1982). The preamble of the Norris-LaGuardia Act reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

28. 398 U.S. 235 (1970), *overruling* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

anti-injunction provisions of the Norris-LaGuardia Act.[29]

In *Boys Markets*, an employer and a union were parties to a collective bargaining agreement that included both a no-strike provision and a provision consigning all contractual disputes to arbitration.[30] Irrespective these provisions, the union went on strike alleging that the employer had violated the collective bargaining agreement when it allowed non-union workers to rearrange the frozen food section in the employer's supermarket.[31] The employer sought injunctive relief to enjoin the strike and specific performance of the arbitration provision in the contract.[32]

The Court was faced with the dilemma of deciding whether to enforce the union's promise not to strike (and the parties' agreement to arbitrate) by issuing an injunction or to follow the dictates of Norris-LaGuardia and deny injunctive relief. To resolve this issue, the Court engaged in a lengthy, historical discussion of the law and federal policy surrounding the question of whether the federal judiciary should issue injunctive relief in labor disputes. The Court concluded that although labor law and public policy, in general, have substantially changed through the years to reflect the dynamic character of American labor politics, the law relating to federal court involvement in granting injunctive relief in labor disputes has not been modified to reflect the new federal policies.[33]

The Court explained that a rigid application of Norris-LaGuardia in 1970 was inappropriate because the "Act was responsive to a situation totally different from that which exists today."[34] Since 1932 when Norris-LaGuardia was enacted, labor unions have grown and become more powerful. As union strength has magnified, Congressional policy has shifted from attempting to protect the unions to encouraging collective bargaining and promoting the use of peaceful techniques for resolving labor disputes.[35]

The enactment of the National Labor Relations Act in 1947 reflected the new federal policy of encouraging peaceful settlement of labor disputes through collective bargaining and the use of grievance and arbitration procedures.[36] Section 301(a) of the Act[37] conferred subject-

29. *Id.* at 253-54.
30. *Id.* at 238-39.
31. *Id.* at 239.
32. *Id.* at 239-40.
33. *Id.* at 249-53.
34. *Id.* at 250.
35. *Id.* at 251.
36. This congressional policy is embodied in § 203(d) of the Labor Management Relations Act. Labor Management Relations § 203(d), 29 U.S.C. § 173(d). The Act provides in pertinent part, "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *See also* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578

matter jurisdiction on the federal courts to hear cases involving violations of collective bargaining agreements.[38] According to section 301(a), the federal courts are permitted to hear cases involving a breach of a no-strike clause or the violation of an arbitration provision.

Therefore, two conflicting statutes with differing policy considerations had emerged: the Norris-LaGuardia Act, prohibiting injunctive relief in labor disputes; and the Labor Management Relations Act, permitting parties to a contract to seek enforcement of their agreement in federal courts. The Supreme Court attempted to reconcile these seemingly contradictory Congressional dictates in *Boys Markets*.[39] The Court held that the federal courts had the authority to issue injunctive relief in limited situations when either (1) the collective bargaining agreement contains a no-strike clause or (2) the strike involves a grievance that the parties have agreed to arbitrate.[40]

In *Buffalo Forge Co. v. United Steelworkers of America*,[41] the Supreme Court was asked to decide whether injunctive relief could be granted to enjoin employees engaged in a sympathy strike.[42] As in *Boys Markets*, the employees in *Buffalo Forge* were bound by a no-strike clause and a mandatory arbitration provision.[43] However, the Court denied injunctive relief because the underlying dispute was not "even remotely subject to the arbitration provision of the contract."[44] In this case, the Court drew a distinction between a strike based on an arbitrable grievance and a sympathy strike *not* based on an arbitrable dispute. To obtain a section 301 injunction, the union must be striking over an arbitrable issue because the policy underlying section 301 injunctions

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(1959) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement."). *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITATION WORKS 1-43 (1973).

37. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(a) (1976).

38. *See supra* note 4 for the statutory language of section 301.

39. The Court explained:

> The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250 (1970).

40. *Id.* at 253-55. The rationale underlying the Court's holding was that "[t]he central purpose of the Norris-LaGuardia Act to foster the growth and vitality of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration." *Id.* at 252-53.

41. 428 U.S. 397 (1976).

42. A sympathy strike is "a strike in which employees (whether in a union or not) who have no dispute with their employer, honor a union's picket line." B. FELDACKER, LABOR GUIDE TO LABOR LAW 227 (2d ed. 1983).

43. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 399-400 (1976).

44. *Id.* at 407.

is the enforcement of the parties' agreement to arbitrate.[45] *Buffalo Forge* highlighted for the first time that (1) a dispute over an arbitrable issue is necessary in seeking a section 301 injunction, and (2) preservation of the arbitral process is an essential requirement for issuance of a section 301 injunction.[46]

B. *Recognition of Section 301 "Status Quo Injunctions" Against Employers*

Subsequent to the *Boys Markets* and *Buffalo Forge* decisions, unions began to petition the courts for section 301 injunctions against employers allegedly engaged in conduct violative of their collective bargaining agreements and subject to mandatory arbitration provisions.[47] Applying the policy of protecting the arbitration process underlying *Boys Markets* and *Buffalo Forge*, federal courts extended the use of section 301 injunctions to enjoin employer conduct that would render the arbitral decision a "futile endeavor."[48] Thus, many courts recognized that issuance of an injunction "in aid of arbitration" was a "two-sided coin."[49]

Section 301 injunctions against employers are commonly referred to as "status quo injunctions"[50] because they require the employer to maintain the status quo pending arbitration of the dispute.[51] Status quo

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45. *See id.* 410-11.

46. *Id.* at 407-13.

47. Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc., 582 F.2d 1336 (4th Cir. 1978); Bakery Drivers Local 802 v. S.B. Thomas, Inc., 99 L.R.R.M. 2253 (E.D.N.Y. 1978); Columbia Typographical Union No. 101 v. Evening Star Newspaper Co., 100 L.R.R.M. 2394 (D.D.C. 1978); Lever Brothers Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976); Amalgammated Food Employees Union, Local 590 v. National Tea Co., 346 F. Supp. 875 (W.D. Pa. 1972), *remanded without opinion*, 474 F.2d 1338 (3d Cir. 1972); Technical, Office & Professional Workers Local 575 v. Budd Co., 345 F. Supp. 42 (E.D. Pa. 1972).

48. Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc., 529 F.2d 1073, 1077 (9th Cir. 1976), *vacated* and *remanded*, 429 U.S. 807 (1976), *reversed*, 550 F.2d 1237 (9th Cir. 1977) (Greyhound II).

49. Lever Brothers Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115, 123 (4th Cir. 1976). (The court explained "[a]n injunction to preserve the status quo pending arbitration may be issued either against a company or against a union in an appropriate *Boys Markets* case. . ."). Another district court remarked, "It would be ironic indeed if a Court could enjoin a strike under the principles of *Boys Markets* but was powerless to prevent similar action of the employer in light of the strong labor concerns that prompted the enactment of the Norris-LaGuardia Act." Columbia Typographical Union v. Evening Star Newspaper Co., 100 L.R.R.M. 2394, 2395 (D.D.C. 1978).

50. It is interesting to note that although "status quo injunctions" have consistently been associated with enjoining employers from conduct violative of their collective bargaining agreements, section 301 injunctions against unions are also of a status quo nature because they prohibit the unions from striking and forcing management to concede to changes prior to arbitration.

51. *See* Note, *Enjoining Employers Pending Arbitration — From M-K-T to Greyhound*

injunctions against employers, however, are rarely issued because of the inability of the unions to satisfy the stringent "in aid of arbitration" requirement. Few employer actions actually "frustrate(s) the arbitral process or deprive(s) the union of an otherwise effective arbitral remedy,"[52] because unions usually can obtain an adequate remedy in arbitration.

Employers generally do not promise to preserve the status quo in their collective bargaining agreements. Rather, employers only promise to submit to grievance and arbitration proceedings for resolving their labor disputes. The unions, on the other hand, promise not to strike in exchange for the employers' promise to submit to arbitration.[53] Thus, unlike injunctions against employee strikes "where the implication of a duty not to strike may be 'essential to carry out promises to arbitrate,'"[54] there ordinarily will be no need to infer a duty on an employer to preserve the status quo in order to protect arbitration.[55] Notwithstanding the strict standard applied by the courts, a line of cases has held in favor of injunctive relief against employers where the unions have made a sufficient showing that the injunction was "in aid of arbitration."[56]

C. *In Aid of Arbitration and Irreparable Harm—An Illusory Distinction*

In granting a motion for a section 301 injunction, courts require a showing that the traditional equitable considerations[57] and the "in aid of arbitration" requirement[58] have been satisfied. Examination of judicial application of the section 301 standard reveals that many courts are blurring together the equitable consideration of irreparable harm[59] and the "in aid of arbitration" requirement. Some courts expressly, and others implicitly, have defined irreparable harm in terms of a finding of frustration of arbitration.[60] In *Local Lodge, No. 1266 v. Panoramic*

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and Beyond, 3 IND. REL. L.J. 169 (1979) for a similar definition of status quo injunctions which the author labels "status quo orders."

52. Local Lodge No. 1266, International Association of Machinists and Aerospace Workers, AFL-CIO v. Panoramic Corp., 668 F.2d 282 (7th Cir. 1981).

53. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 247-48 (1970) ("As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.").

54. Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc., 550 F.2d 1237, 1239 (9th Cir. 1977) (Greyhound II).

55. *Id.*

56. *See supra* note 47 for cases where courts have issued injunctions against employers.

57. *See supra* note 5 for the traditional equity test for determining the propriety of injunctive relief.

58. *See supra* note 6 for definition of the phrase "in aid of arbitration."

59. *See supra* note 12 for definition of irreparable harm.

60. The district court in *American Postal Workers* recognized the relatedness of irreparable injury and frustration of arbitration when it stated:

Corp.,[61] the Seventh Circuit described this interrelationship as the "twin ideas" of irreparable harm and frustration of arbitration.[62] The court explained that "[a]n injunction in aid of arbitration is appropriate, therefore, *only* when the actual or threatened harm to the aggrieved party amounts to a frustration or vitiation of arbitration."[63] Thus, employees suffering irreparable harm pending arbitration of a labor dispute will not be protected by issuance of an injunction *unless* the union can show that the harm threatened is so egregious that it frustrates the arbitration process. Consequently, as applied by many courts, the concept of irreparable harm has no independent significance from that of frustration of arbitration.

The irreparable harm and "in aid of arbitration" prerequisites have been satisfied in only a limited number of cases.[64] A review of the decisions granting injunctive relief indicates that permanent job loss caused by drastic employer action is the only situation in which the courts have found irreparable injury amounting to a frustration of arbitration.[65] Employer conduct that has been held sufficiently egregious as to result in job loss, and thereby constituting a frustration of arbitration, has included plant relocation,[66] termination of business,[67] subcontracting union work,[68] and partial liquidation of assets.[69]

Although money damages were available to the employees in these cases in the event that the arbitrator found in favor of the union, the courts have consistently held money damages to be an inadequate remedy for loss of employment.[70] In *Columbia Typographical Union, No. 101*

> The inquiry into whether the arbitration would be frustrated by the failure to issue an injunction is closely related to the question of whether the plaintiffs will suffer an irreparable injury.

American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 408 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

61. 668 F.2d 276 (7th Cir. 1981).

62. *Id.* at 286.

63. *Id.* (emphasis added).

64. *See supra* note 47.

65. Note, *Enjoining Employers Pending Arbitration—From M-K-T to Greyhound and Beyond*, 3 IND. REL. L.J. 169, 200-03 (1979). ("Other than plant relocations and shutdowns which cause permanent job loss, there are probably no employer changes which threaten to cause irreparable harm that will affect the arbitral process.").

66. Lever Brothers Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976).

67. Columbia Typographical Union No. 101 v. Evening Star Newspaper Co., 100 L.R.R.M. 2394 (D.D.C. 1978).

68. Bakery Drivers Local 802 v. S.B. Thomas, Inc., 99 L.R.R.M. 2253 (E.D.N.Y. 1978).

69. Teamsters Local 71 v. Akers Motor Lines, Inc., 582 F.2d 1336 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

70. Local Lodge No. 1226 v. Panoramic Corp., 668 F.2d 276, 286 (7th Cir. 1981). ("Where, as here, employer action threatens a permanent loss of jobs, a damage remedy is inadequate."). *See also* Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas

v. Evening Star Newspaper Co.,[71] the *Evening Star* ceased publication of its newspaper during the life of its collective bargaining agreement with the union, allegedly in breach of a status quo clause in the contract.[72] The D.C. Circuit issued a section 301 injunction preventing the *Evening Star* from ceasing publication.[73] The court explained that "[m]oney in the bank does not fully compensate for the loss of a man or woman's livehood [sic]."[74]

In *Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc.*,[75] the Court of Appeals for the Ninth Circuit reversed the lower court decision enjoining an employer from unilaterally altering the work schedules of its employees in violation of its collective bargaining agreement. *Amalgamated Transit* demonstrates that courts are reluctant to find irreparable harm amounting to frustration of arbitration *unless* job loss is involved. The court reasoned that issuance of an injunction was improper because the arbitrator could subsequently alter the pay schedules if he or she determined that the company violated its agreement with the union.[76] Thus, the court explained "the situation can be restored substantially to the status quo ante."[77]

Lever Brothers Co. v. International Chemical Workers Union, Local 217[78] is a prototypical case for illustrating the analysis used by the courts in determining the propriety of status quo injunctions. In *Lever Brothers*, the union sought to enjoin the relocation of the employer's soap production operation from Maryland to Indiana until the employer complied with the alleged contractual prerequisites to move.[79] The court found that the failure to issue an injunction would result in irreparable harm. It stated:

> Had the district court not preserved the *status quo*, Lever Brothers would have *permanently transferred* their plant from Baltimore, Maryland, to Hammond, Indiana. If the union then prevailed in the arbitration, they would have had a double burden to satisfy—first, to convince the company that it should not have moved the plant to Hammond, Indiana—a *fait*

Railroad Co., 363 U.S. 528, 534 (1960); Teamsters Local 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1341 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979); Bakery Drivers Local 802 v. S.B. Thomas, Inc., 99 L.R.R.M. 2253, 2257 (E.D.N.Y. 1978); Columbia Typographical Union No. 101 v. Evening Star Newspaper Co., 100 L.R.R.M. 2394, 2396 (D.D.C. 1978); Amalgamated Food Employees Union, Local 590 v. National Tea Co., 346 F. Supp. 875, 882-83 (W.D. Pa. 1972), *remanded without opinion*, 474 F.2d 1338 (3d Cir. 1972).

71. 100 L.R.R.M. 2394 (D.D.C. 1978).
72. *Id.* at 2395.
73. *Id.* at 2396.
74. *Id.*
75. 550 F.2d 1237 (9th Cir. 1977) (Greyhound II).
76. *Id.* at 1239.
77. *Id.*
78. 554 F.2d 115 (4th Cir. 1976).
79. *Id.* at 117.

> *accompli*, and then it would have had the burden to convince the company to move the plant back to Baltimore, Maryland. The arbitration in this sense would undoubtedly have been 'but an empty victory' for the union.[80]

Thus, it appears that the distinction between irreparable harm and the "in aid of arbitration" prerequisite in the section 301 standard is illusory. The courts appear to be equating the concepts of "in aid of arbitration," irreparable harm, and permanent job loss—and only the satisfaction of this equation with its equivalent variables will provide a successful claim for injunctive relief.

III. APPLICATION OF THE "IN AID OF ARBITRATION" TEST TO *AMERICAN POSTAL WORKERS*

A. *The District Court and the Second Circuit's Application of the Section 301 Standard*

In *American Postal Workers*, the District Court for the District of Connecticut was presented with the issue of whether to enjoin an employer from discharging an employee pending arbitration of a wrongful discharge claim, based on his first amendment right of free speech. The district court applied the standard that had developed for issuing section 301 injunctions: the traditional equity considerations[81] and a finding of frustration of arbitration.[82]

Applying the traditional equitable standard for injunctive relief, the district court found irreparable harm and a likelihood of success on the merits.[83] The court held that the possible chilling effect on the exercise of the employees' first amendment rights to free speech resulting from Danko's discharge constituted irreparable harm.[84] The court based its decision on case law authority that established that loss of first amendment rights for even a short period constitutes irreparable harm[85] and "a plausible claim of a 'chilling effect' on the exercise of [first amend-

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80. *Id.* at 122.

81. *See supra* note 5 for the traditional equity considerations.

82. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 408-09 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

83. *Id.* at 407-08.

84. The district court judge stated:

> I conclude that the plaintiffs have shown that the failure to enjoin Danko's discharge would result in a chilling of his and the other employees' exercise of their first amendment rights; thus, the plaintiffs have satisfied the irreparable harm requirement.

Id. at 408.

85. The district court articulated "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 407 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

ment rights] meets the irreparable harm requirement."[86] Following its finding of irreparable harm and a brief discussion of the likelihood of success on the merits, the court examined the question of whether failure to issue an injunction would result in frustration of the arbitral process. The court mechanically applied the section 301 analysis that had developed in the line of cases beginning with *Boys Markets*.[87]

In applying the section 301 standard, the court first recognized the relatedness of the irreparable injury requirement and the "in aid of arbitration" requirement.[88] It stated that it would need to determine if the injury was sufficiently egregious that it would result in a frustration of arbitration.[89] The court summarily concluded that the arbitrator would be *unable* to remedy the chilling effect of the employees' exercise of their first amendment rights, and therefore, an injunction was necessary to prevent a frustration of arbitration.[90]

The Second Circuit reversed the district court decision. It held that Danko and the union failed to demonstrate sufficient injury to justify a finding of irreparable harm.[91] As a result, the court found no basis to conclude that an injunction was necessary to aid the arbitral process.[92] The court reasoned that if the arbitrator found that Danko was dismissed without cause, the arbitrator would have available the remedies of reinstatement and full back pay.[93] Thus, the arbitrator's ability to resolve the issue and to fashion a remedy would not be frustrated.

B. *The District Court's Extension of Status Quo Injunctions to Cover First Amendment Claims . . . And Its Failure to Consider Arbitrability of the Claim*

Given the factual dissimilarity between *American Postal Workers*[94] and the cases in which the section 301 analysis has traditionally been applied,[95] the appropriateness of applying the section 301 standard demands close scrunity. Prior to *American Postal Workers*, courts exclusively granted injunctive relief in those cases in which permanent

86. *Id.* (quoting Maceira v. Pagan, 649 F.2d 8, 18 (1st Cir. 1981)).

87. 398 U.S. 235 (1970).

88. *See supra* note 60 for the courts discussion of the relatedness of irreparable injury and frustration of arbitration.

89. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 408-09, *rev'd*, 766 F.2d 715 (2d Cir. 1985).

90. *Id.* at 409.

91. American Postal Workers Union v. United States Postal Service, 766 F.2d 715, 722 (2d Cir. 1985).

92. *Id.* at 723.

93. The Second Circuit explained, "[t]he dispute is currently the subject of arbitration, and if Danko's discharge is ultimately deemed to have been without cause, he can be reinstated with full pay, thereby returning to his former status with no difficulty." *Id.*

94. *See supra* text accompanying notes 7-13.

95. *See supra* text accompanying notes 64-80.

job loss was threatened by drastic employer action (e.g., shut-down, relocation).[96] Only in those limited situations did the courts find the irreparable injury sufficient to satisfy the "in aid of arbitration" requirement; for only under those extraordinary circumstances would the arbitrator be unable or unwilling to remedy the harm caused by the breaching party. The district court enlarged the scope of status quo injunctions in *American Postal Workers* when it recognized that injunctive relief could be granted for violations of first amendment rights.[97]

At first blush, one might commend the district court for extending the use of injunctions to a finding of irreparable harm based on a first amendment violation. On closer scrutiny, however, it appears that the district court may have incorrectly applied the section 301 standard by failing to consider the section 301 prerequisite of arbitrability of the claim.[98] The district court found that the "in aid of arbitration" requirement was satisfied because the arbitrator would be unable to provide an appropriate remedy to Danko and the union for infringing upon their first amendment rights.[99] The court's argument (although not expressly stated) was that if the discharge was effectuated, there would be a chilling effect on the employees' first amendment rights and the only remedy available to the employees in arbitration would be monetary damages. The district court found such damages to be inadequate relief—just as monetary damages had been held inadequate relief when permanent job loss was threatened by employer actions.

Although this is a very appealing argument because it provides protection of first amendment rights, the court carelessly applied the section 301 analysis when it failed to consider the *Buffalo Forge* precondition of arbitrability.[100] If the first amendment claim is nonarbitrable, a section 301 injunction cannot be obtained. Assuming arguendo that the first amendment claim was nonarbitrable in this case, a section 301 claim could not have been made and injunctive relief would have been denied because of the invocation of the anti-injunction provisions of the Norris-LaGuardia Act.[101] The court's analysis suffers from two major defects: (1) it assumes arbitrability of the first amendment claim because of the undisputed arbitrability of the wrongful discharge claim;[102] and (2) it fails to recognize that the plaintiffs' claim was based on a

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96. *See supra* text accompanying notes 64-80.

97. *See supra* text accompanying notes 81-90.

98. The section 301 precondition of arbitrability was first recognized in Buffalo Forge Co. v. United States Steelworkers. *See supra* text accompanying notes 41-46.

99. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 409 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

100. *See supra* text accompanying notes 41-46 for discussion of the *Buffalo Forge* precondition of arbitrability.

101. *See supra* note 27 for the preamble of the Norris-LaGuardia Act.

102. *See infra* text accompanying notes 104-21.

public right, the first amendment right of free speech, that mandates a standard of review accorded to all constitutional claims.[103]

C. *Arbitrability of the First Amendment Claim*

The arbitrability of the first amendment claim in *American Postal Workers* is questionable. In general, an arbitrator has the authority to remedy those matters within the purview of the contract.[104] This definition of arbitral authority, however, offers little assistance in determining whether a particular dispute is arbitrable because most courts will *broadly* construe the terms of a collective bargaining agreement.[105] A liberal construction of labor agreements translates into granting extensive powers to arbitrators. The underlying reason for the court's broad interpretation of labor contracts (so as to relegate almost all labor disputes to arbitration) is the courts' attempt to effectuate the federal policy of encouraging peaceful resolution of labor disputes through grievance and arbitration procedures.[106]

In the *Steelworkers Trilogy*[107] cases, the Supreme Court exalted the role of the arbitrator to an unprecedented level.[108] In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[109] the Court stated that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[110]

Despite the Court's general deference to arbitral authority, the Court has repeatedly stated that an arbitrator's authority is not without limits.[111]

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103. *See infra* text accompanying notes 123-61.

104. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement."). *See generally* F. ELKOURI AND E. ASPER ELKOURI, HOW ARBITRATION WORKS, 169-80 (1973).

105. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers that asserted dispute. Doubts should be resolved in favor of coverage.").

106. *Id.*

107. The Steelworkers Trilogy refers to the following three cases: United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

108. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 551-56 (1976).

109. 363 U.S. 574 (1960).

110. *Id.* at 582.

111. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) ("If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced.") (quoting

An arbitrator has the power to decide *only* those issues that the parties have agreed by contract to submit to arbitration.[112] In order to ascertain the intent of the parties, the courts most often refer to the language of the contract,[113] and the common practices of the industry.[114]

In *American Postal Workers*, the collective bargaining agreement did not contain an explicit provision consigning to arbitration disputes involving employees' freedom of speech.[115] The fact that the first amendment claim arose out of a dispute consigned to arbitration (Danko's wrongful discharge claim) does not necessarily imply that the parties intended all disputes, relating to or arising out of wrongful discharge claims, be resolved by arbitration. Although the courts broadly construe labor contracts,[116] it is highly unlikely that the employees, when negotiating their contract, intended to have an arbitrator decide their constitutional right of free speech.

Three reasons support this conclusion. First, collective bargaining agreements seldom include provisions guaranteeing employees' rights duplicative of constitutional rights.[117] Second, the plaintiffs did not seek injunctive relief from an arbitrator, nor did they seek resolution of their first amendment claim through the grievance and arbitration procedures established in their collective bargaining agreement.[118] Finally, the em-

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from United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 588-92, 593-98 (1976).

112. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

113. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) ("As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement and he must interpret and apply the agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.") (quoting in part from United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

114. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

115. Although the opinion did not explicitly state that the collective bargaining agreement did not contain a provision consigning to arbitration disputes over the employees' free speech, it shall be inferred that the court's silence on this point implies that no such provision was present. If there was such a provision the court certainly would have mentioned it in its analysis whether an injunction was necessary to preserve the arbitral process. The court only mentioned the fact that the wrongful discharge claim was subject to arbitration. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

116. *See supra* text accompanying notes 107-09.

117. *See, e.g.*, Selected Constraints in Text 1 Lab. Re. Rep. (BNA) § 20:i (1986). This reporter contains numerous collective bargaining agreements adopted by parties in various industries. None of the agreements, even those directed to employment in the public sector, included provisions providing rights to employees duplicative of constitutional first amendment rights.

118. The opinion made no mention of the plaintiffs having commenced grievance and

ployees sought injunctive relief from the district court on a constitutional claim of free speech and not on a contractual right to free speech.[119] Finding the employees' freedom of speech claim to be an arbitrable issue would require construing the labor contract beyond its reasonable limits.

Given the strong likelihood that the first amendment claim was nonarbitrable, the district court erred in its application of the section 301 standard of analysis because the essential precondition of arbitrability would not have been satisfied.[120] Consequently, by relying solely on labor law and policy for protecting the plaintiffs' right to free speech, the courts probably would have been forced to deny injunctive relief because of the application of the Norris-LaGuardia anti-injunction provisions.[121] However, the plaintiffs had a right to seek injunctive relief on an alternative claim—a first amendment[122] constitutional claim of free speech.[123]

IV. PUBLIC VS. PRIVATE RIGHTS IN THE EMPLOYMENT SETTING

A. Alexander v. Gardner-Denver Co. *and Its Progeny*

In the landmark decision of *Alexander v. Gardner-Denver Co.*,[124] the Supreme Court held that the prior submission to arbitration of a contractual right that is duplicative of a statutory right does not preclude an employee from obtaining a trial de novo under the statute.[125] In that case, a black employee was allegedly discharged for producing too many defective parts.[126] The employee claimed the discharge was racially motivated.[127] Pursuant to an anti-discrimination provision in his collective bargaining contract, the employee grieved and arbitrated his wrongful discharge claim on the grounds of discrimination.[128] After having been defeated in the grievance and arbitration proceedings, the employee

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arbitration procedures on the issue of a chilling effect on their right to free speech. The court only states that arbitration proceedings had commenced on the wrongful discharge claim. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

119. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 406 (D. Conn. 1984) ("But the plaintiffs contend that Danko's discharge will have a chilling effect on his and the other employees' exercise of their *first amendment rights*.") (emphasis added), *rev'd*, 766 F.2d 715 (2d Cir. 1985).

120. *See supra* text accompanying notes 41-46.

121. *See supra* note 27 for the preamble of the Norris-LaGuardia Act.

122. *See supra* note 2 for a restatement of the first amendment of the Constitution.

123. *See infra* text accompanying notes 124-61.

124. 415 U.S. 36 (1974).

125. *Id.* at 51-54.

126. *Id.* at 38.

127. Curiously, the employee did not raise the racial discrimination claim until the final pre-arbitration step. *Id.* at 42.

128. *Id.* at 39.

filed a Title VII action[129] in federal district court. The district court granted summary judgment[130] for the former employer and the court of appeals affirmed.[131] The Supreme Court reversed, holding that Title VII rights cannot be waived and that an employee has the right to a judicial proceeding regardless of a prior arbitral decision on contractual rights duplicative of Title VII rights.[132]

In *Alexander v. Gardner-Denver Co.*, the Court drew a distinction between the public rights of an employee conferred by statute or the Constitution and the private rights of an employee established in a collective bargaining agreement.[133] The Court explained:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.[134]

The Court distinguishes public rights from private rights because of its belief that the public rights should be resolved in the courtroom rather than in arbitration.[135]

The Court proffers several reasons why judicial resolution of statutory and constitutional rights is preferable over arbitral resolution of these rights.[136] First, the arbitrator has a specialized expertise and is called upon to decide the "law of the shop," not the "law of the land."[137]

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129. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h (1982)). Section 703 of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982).

130. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971).

131. Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972).

132. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-54 (1974).

133. *Id.* at 49-50.

134. *Id.*

135. *Id.* at 57. ("[T]he resolution of statutory or *constitutional* issues is a primary responsibility of courts, and judicial construction...") (emphasis added).

136. *Id.* at 53-58. *See also* McDonald v. City of West Branch, 466 U.S. 284 (1984).

137. *Id.* at 57.

This expertise is limited to issues concerning the "demands and harms of industrial relations."[138] Also, the arbitrator's authority derives solely from the contract and, therefore, he or she may not have the power to enforce statutory or constitutional rights.[139] Finally, arbitral factfinding generally is not the equivalent of judicial factfinding.[140]

Alexander v. Gardner-Denver Co. does not prohibit the inclusion of collective bargaining agreements that provide protection of rights already protected by statute or under the Constitution.[141] However, the arbitral resolution of contractual claims will not result in a final and binding decision.[142]

In two cases following *Alexander v. Gardner-Denver Co.*,[143] the Court echoed the legal principles and policy considerations of providing employees a judicial forum for adjudicating statutory or constitutional claims. In *Barrentine v. Arkansas-Best Freight System*,[144] a group of truckdrivers sought compensation for unpaid labor.[145] The employee truckdrivers submitted their wage claims to a grievance committee pursuant to their collective bargaining agreement.[146] The committee rejected the employees' wage claims without explanation,[147] and the employees subsequently filed suit in federal court for compensation under section 6 of the Fair Labor Standards Act.[148] The district court

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138. *Id.*

139. *Id.* at 53.

140. *Id.* at 57-58.

141. *See id.* at 59-60.

142. It is unclear what effect, if any, an arbitral award will have on the parties' decision to pursue the contractual arbitration procedure, given that the courts will grant a trial *de novo* subsequent to any arbitral award. However, the court appears to hold that if the contract consigns to arbitration a right duplicative of statutory rights, a party will have both forums available. The Court states:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).

This district court for the District of Columbia in a case factually similar to *American Postal Workers* (*see infra* note 161) stated that the arbitrator's "decision is not entitled to any weight in adjudicating the present constitutional claim." American Postal Workers Union v. United States Postal Service, 598 F. Supp. 564, (D.D.C. 1984).

143. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); McDonald v. City of West Branch, 466 U.S. 284 (1984).

144. 450 U.S. 728 (1981).

145. *Id.* at 730.

146. *Id.*

147. *Id.* at 731.

148. Fair Labor Standards Act, 52 Stat. 1062 (1938) (codified as amended at 29 U.S.C. § 206(a). Section 6 of the Act provides in pertinent part, "[e]very employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, ... wages at the following rates ....

and court of appeals refused to address the employees' wage claims because of the prior submission of these claims to grievance and arbitration proceedings.[149]

The Supreme Court reversed the lower court decisions, holding that the employees' claims under the Fair Labor Standards Act were *not* barred by the prior submission of their grievances to arbitration and that the employees had the right to seek judicial relief for the statutory violation.[150]

The court in *McDonald v. City of West Branch*[151] also relied on *Alexander v. Gardner-Denver Co.*. This case is of particular importance to the discussion of *American Postal Workers* because of its factual similarity.[152] In *McDonald*, the plaintiff alleged he was discharged for exercising his first amendment rights.[153] The plaintiff commenced grievance and arbitration procedures pursuant to a provision in his collective bargaining agreement requiring proper cause for employee discharge.[154] The plaintiff lost in arbitration, and subsequently filed a section 1983[155] action seeking judicial relief for his statutory claim.[156] Employing the reasoning used in *Alexander v. Gardner-Denver Co.*, the Court held that individuals have the right to judicial resolution of their section 1983 claims, and that federal courts cannot apply res judicata or collateral estoppel to an arbitral award.[157]

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149. Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 734 (1981).

150. *Id.* at 737. ("Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

151. 104 S. Ct. 1799 (1984).

152. In both cases the plaintiffs alleged they were discharged for exercising their first amendment right to free speech. In *McDonald*, however, the plaintiff brought the action under § 1983 because the action was against city officials and the chief of police. Thus, state action was involved. The plaintiffs in *American Postal Workers* were unable to bring a § 1983 claim because there was no state action; the employer was the United States Postal Service.

153. The plaintiff alleged he was discharged for exercising his first amendment rights of "freedom of speech, freedom of association, and freedom to petition the government for redress of grievances." McDonald v. City of West Branch, 104 S. Ct. 1799, 1801 (1984).

154. *Id.*

155. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)). Section 1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983 (1982).

156. McDonald v. City of West Branch, 104 S. Ct. 1799, 1800 (1984).

157. *Id.* at 1803. ("[A]lthough arbitration is well suited to resolving contractual

B. *Application of* Alexander v. Gardner-Denver Co. *Analysis to* American Postal Workers

In *American Postal Workers*, the plaintiffs improperly pled their motion for injunctive relief by seeking a section 301 injunction to protect their constitutional right to free speech. Their pleading was clearly erroneous because section 301 *only* protects *private* rights secured under collective bargaining agreements,[158] not *public* rights conferred by statute or guaranteed under the Constitution. The plaintiffs apparently failed to recognize that they had two independent claims for relief: a constitutional claim protecting their public right and a section 301 claim protecting their private right.

Although it is questionable whether the plaintiffs actually had a private right of free speech,[159] it is undeniable that plaintiffs had a public, first amendment right. Under a constitutional claim, the plaintiffs could have filed a motion for a preliminary injunction to protect their right to free speech pending judicial resolution of their dispute. If the plaintiffs had motioned for a preliminary injunction, the district court would have applied the traditional equitable requirements for issuing injunctive relief,[160] rather than the stringent "in aid of arbitration" standard applied under section 301.

Had the plaintiffs recognized this alternative claim for injunctive relief, it is doubtful that they would have sought injunctive relief solely under section 301 because section 301 requires a showing of frustration of arbitration. Under section 301 the plaintiffs' claim would have failed if (1) the claim was nonarbitrable, (2) the injunction was *not* "in aid of arbitration," or (3) the equitable considerations did not support injunctive relief. Under the constitutional claim, the plaintiffs would only have been required to satisfy the traditional equitable requirements. The plaintiffs' failure to recognize and plead their alternative claim for injunctive relief under the Constitution[161] had the potential of jeopardizing their ability to obtain an injunction to protect their first amendment right of free speech.

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disputes, our decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights.").

158. *See supra* note 4 for the statutory language of section 301.

159. *See supra* text accompanying notes 104-19.

160. *See supra* note 5 for the traditional equitable requirements.

161. The plaintiffs' failure to plead their constitutional claim is especially perplexing given that two months after the district court decision, the District Court for the District of Columbia decided a factually similar case where the same union vindicated its constitutional first amendment rights after having failed on a contractual right to relief. American Postal Workers Union, AFL-CIO v. United States Postal Service, 598 F. Supp. 564 (D.D.C. 1984) (not to be confused with case selected for discussion in this Case

V. CONCLUSION

In *American Postal Workers*, the plaintiffs erroneously pled their constitutional claim under section 301 of the Labor Management Relations Act, and the district court and the court of appeals failed to recognize or correct the plaintiffs' error. The employees should have sought judicial relief under the Constitution for violation of their first amendment right of free speech rather than seeking injunctive relief under the labor laws.

Affording employees the opportunity to vindicate their statutory and constitutional rights in a judicial forum, regardless of whether the violation occurs in the employment setting or is subject to a collective bargaining provision consigning the dispute to arbitration, comports with the fundamental principle that private rights are subordinate to public rights. This principle is *not* inconsistent with the federal policy of encouraging peaceful resolutions of labor disputes through arbitration because Congress intended "labor disputes" to include only those "controvers[ies] concerning terms and conditions of employment."[162] Congress promoted the use of arbitration because it was believed to be the best method for resolving disputes in the employment setting given that an arbitrator has specialized knowledge of the "demands and norms of industrial relations."[163] Congress did not intend that constitutional or statutory rights be resolved by an arbitrator because these issues do not fall within the arbitrator's specialized knowledge. Statutory and constitutional issues are best resolved in a judicial forum, and *Alexander v. Gardner-Denver* makes this forum available to employees whose statutory or constitutional rights have been violated regardless of a prior arbitral decision on a duplicative contract right.

Anastasia N. Markakis

Comment).

The dispute arose when an employee published an article in a union newspaper relaying certain information that the employee stated was obtained through reading privileged postal mail. The employee was discharged as a result of this conduct. The employee later denied actually having read the mail and in a written retraction of the statement explained that the reference was only made for purposes of dramatization. The arbitrator denied relief under the contract.

The district court applied the *Alexander v. Gardner-Denver Co.* analysis and held that the plaintiff had a claim for relief under the Constitution in addition to any contractual claim that the employee may have had. The court stated that the arbitral decision "is not entitled to any weight in adjudicating the present constitutional claim." *Id.* at 568.

162. Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 (1982). Section 113(c) defines labor dispute as follows:

> (c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

163. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).